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No. 956

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

315 U.S. 8

J. P. GARDZIELEWSKI,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERMAN S. WALLER,
Counsel for Petitioner.

CAMERON LATTER,
JAMES ELWYN DANIELS,
THADEUS NIEMIRA,
Of Counsel.

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INDEX.

	PAGE
Petition for Certiorari	1-6
Reasons Relied on for Allowance of Writ	4-6
Summary Statement of Matter Involved	1-4
Brief in Support of Petition for Certiorari	7-30
Argument	20-30
Jurisdictional Statement	8
Opinion of Court Below	7
Specifications of Error	14-15
Statement of Case	8-13
Summary of Argument	16-19

TABLE OF CASES CITED.

Hale v. United States, 25 Fed. (2d) 430 ..... 16, 21, 22

Hendrey v. United States, 233 Fed. 5 ..... 19, 27

Rooney v. United States, 203 Fed. 928 ..... 16, 20, 21

United States v. Corso, 100 Fed. (2d) 604 17

STATUTES CITED.

Judicial Code, Section 240 8

United States Code, Title 18, Section 550 ..... 8, 14, 20, 22, 24

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Petitioner,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of J. P. Gardzielewski respectfully shows to this Honorable Court, the following:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner was indicted in the District Court of the United States, Northern District of Illinois, Eastern Division, (R. 2-4) for the criminal offense of "unlawfully, wilfully and knowingly" aiding and abetting one Nosek, Chairman and member of a Local Selective Service Draft

Board in Chicago, to "ask, accept and receive" a bribe from a registrant under The Selective Service Act, to influence the official action of Nosek with reference to the classification of the registrant (R. 2-4).

Having been found guilty by the jury upon his trial, petitioner was sentenced to be imprisoned in a penitentiary for a term of two years (R. 128).

On appeal to the United States Circuit Court of Appeals, Seventh Circuit, the judgment of the District Court was affirmed by a divided court, Major, Circuit Judge, dissenting from the conclusion reached by the majority of the Court (R. 147, 151).

The petitioner and his co-defendant, Nosek, were tried together in the District Court, a motion for severance on the part of petitioner having been overruled before trial (R. 6-8, 10).

On the trial, over repeated objections by counsel for petitioner, evidence was admitted of statements made by the co-defendant, Nosek, out of the presence of petitioner, of conversations had by the co defendant, Nosek, with the officers who arrested him for the offense, and with others, likewise out of the presence of petitioner, which conversations and statements, petitioner contends, were prejudicial and harmful to him, were hearsay, as to him, and ought not to have been admitted as affecting petitioner. The following are the pages of the Record where these matters are found: (R. 15, 15-16, 44-45, 50-51, 60).

There was no showing made that petitioner ever ratified or confirmed these statements by his co-defendant, nor has the Government so far contended that he did so.

It was the theory of the Government upon the trial, that because petitioner was indicted under Section 550, Title 18, U. S. C., for "aiding and abetting, counseling and procuring" the principal offender, Nosek, in the commission

of the offense of bribery charged in the indictment, the Government had, as against petitioner, the duty and the right, to prove, circumstantially, the commission of the substantive offense by Nosek, and that this proof was applicable on the trial of petitioner, against petitioner, since, in order to prove that petitioner was guilty of aiding and abetting Nosek in the commission of the offense, the Government must prove that Nosek actually committed the offense.

The trial Court permitted petitioner to preserve objection to all of this evidence, as the Government put in its case, and these objections were restated (R. 67) in the form of a motion in writing, tendered at the close of the case for the Government, moving that the evidence in question be excluded from the record, as to petitioner and that the jury be directed to disregard it as to petitioner.

In overruling this motion, and permitting this proof to stand, as against petitioner, the trial Court, (R. 68) stated that the objections thus raised to this proof by counsel for petitioner were "timely raised" and indicated that after mature deliberation, the trial judge felt that the evidence in question was admissible against petitioner, whereupon petitioner's objections thereto were overruled.

The instructions or charge of the trial Court, to the jury were not preserved in the record, but it has been the contention of petitioner, throughout, that the question at issue involves, not, misdirection of the jury, but the erroneous admission of evidence, highly prejudicial to petitioner, in view of the extremely limited incriminating evidence in this record.

The majority of The Circuit Court of Appeals, in the opinion of the Court which affirmed petitioner's conviction (R. 147-151) disposes of this contention of petitioner by presuming, in the absence of record proof to the contrary, that the trial Court correctly instructed the jury "as to

the law relating to its consideration of the evidence of the case" (R. 150). The majority opinion also holds that the trial Court properly overruled petitioner's motions to exclude this evidence from the record since the evidence was admissible to "establish the commission of the crime by Nosek, an essential element in proof of the charge of aiding, abetting, counselling and procuring the commission of the crime" (R. 150.)

The dissenting opinion, (R. 151-154) maintains that the evidence in controversy was inadmissible as against petitioner, that in view of the tenuous character of the testimony relied on by the Government for the conviction of petitioner, its admission in evidence was harmful and prejudicial error, that to presume that the trial Court correctly instructed the jury as to its effect would in the instant situation do "violence to the record," and that even had the trial Court "changed his mind and correctly instructed the jury," such instruction could "only serve to minimize the effect of the objectionable testimony—it could not remove the error of its admission without limitation" (R. 153).

The content and scope of this evidence, its harmful and prejudicial effect upon petitioner and the legal and logical grounds upon which it should have been excluded from the proofs against petitioner, are stated in the Brief, incorporated herein, in support of this petition.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Petitioner respectfully suggests that from the record of this cause, it is apparent that the writ of certiorari should issue for the following reasons:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit, in holding that the evidence in question was admissible as against petitioner on the ground that proof of the guilt of the principal offender, Nosek was requisite as part of the case against petitioner, indicted for "aiding and abetting" is in conflict with the holding of the Circuit Court of Appeals for the Ninth Circuit in the case of

Rooney v. *United States*, 203 Fed. 928.

2. The decision of the Circuit Court of Appeals for the Seventh Circuit decides an important question of general law in a way probably untenable and in conflict with the weight of authority.

3. The decision of the Circuit Court of Appeals for the Seventh Circuit decides an important question of federal law, which has not been, but should be, decided by this Court.

4. In its decision in the instant case, the Circuit Court of Appeals for the Seventh Circuit has so far sanctioned a departure, by the District Court of the United States, Northern District of Illinois, Eastern Division, from the accepted and usual course of judicial proceedings as to call for the exercise of the power of supervision vested in this Court.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals, for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "*No.* 7759, *the United States of America, Plaintiff-Appellee* v. *J. P. Gardzielewski, Defendant-Appellant*", and that the said judgment and

order of said Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court.

J. P. GARDZIELEWSKI,
Petitioner.

By HERMAN S. WALLER,
Counsel for Petitioner.

CAMERON LATTER,
JAMES ELWYN DANIELS,
THADEUS NIEMIRA,
Of Counsel.